No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

RORY PRAYLOW

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 924(c) of Title 18 requires specified mandatory consecutive sentences for committing certain weapons offenses in connection with "any crime of violence or drug trafficking crime," "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law."

The question presented is whether the "except" clause permits a district court not to impose a mandatory minimum consecutive sentence under Section 924(c) if the defendant is also subject to a greater mandatory minimum sentence on a different count of conviction charging a different offense involving different conduct.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-4a) is unreported but is available at 2010 WL 2340169.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 924(e)(1) of Title 18 of the United States Code is reproduced in the appendix to this petition. App., *infra*, 7a-8a.

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of New York, respondent was convicted of conspiracy to distribute and to possess with intent to distribute one kilogram or more of heroin, in violation of 21 U.S.C. 846 (Count 1); distribution and possession with intent to distribute 100 grams or more of heroin, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B) (Count 2); and possession of a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c) (Count 3). The district court sentenced respondent to 15 years of imprisonment, consisting of concurrent ten-year terms on the drug trafficking convictions and a consecutive five-year term on the Section 924(c) conviction. App., *infra*, 2a. The court of appeals vacated respondent's sentence and remanded for resentencing on the ground that Section 924(c) did not require imposition of the consecutive five-year sentence. *Id.* at 2a-4a.

1. Section 924(c)(1) of Title 18 makes it unlawful to use or carry a firearm during and in relation to, or to possess a firearm in furtherance of, a drug trafficking crime or a crime of violence. See 18 U.S.C. 924(c)(1)(A). The minimum sentence for that offense is five years of imprisonment, "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law." *Ibid.* The term of imprisonment must be "in addition to the punishment provided for"—and run consecutively to the sentence imposed for—the underlying "crime of violence or drug trafficking crime." *Ibid.*; see 18 U.S.C. 924(c)(1)(D)(ii) ("Notwithstanding any other provision of law * * * no term of imprisonment imposed * * * under this subsection shall run concurrently with any other term of

imprisonment imposed * * *, including any term of imprisonment imposed for the [underlying] crime.").

Most courts of appeals have held that the statute's prefatory "except" clause means that a defendant convicted of an offense under Section 924(c)(1) must be sentenced to the mandatory minimum term set forth in that provision unless another penalty provision elsewhere in Section 924(c) or "the United States Code[] requires a higher minimum sentence for *that* [Section] 924(c)(1) offense." *United States* v. *Easter*, 553 F.3d 519, 526 (7th Cir. 2009) (per curiam), petition for cert. pending, No. 08-9560 (filed Mar. 26, 2009); *United States* v. *Villa*, 589 F.3d 1334, 1342-1343 (10th Cir. 2009) ("[T]he prefatory clause to [Section] 924(c) refers only to a minimum sentence provided by [Section] 924(c) or any other statutory provision that proscribes the conduct set forth in [Section] 924(c)."), petition for cert. pending, No. 09-1445 (filed May 26, 2010).

The Second and Sixth Circuits, however, have interpreted the "except" clause to mean that a defendant is exempt from a mandatory minimum consecutive sentence for violating Section 924(c)(1) if the defendant faces a higher mandatory minimum sentence for a different offense "arising from the same criminal transaction or operative set of facts" as the Section 924(c) offense. *United States* v. *Williams*, 558 F.3d 166, 171 (2d Cir. 2009), petition for cert. pending, No. 09-466 (filed Oct. 20, 2009); see *United States* v. *Whitley*, 529 F.3d 150, 158 (2d Cir. 2008); *United States* v. *Almany*, 598 F.3d 238 (6th Cir. 2010), petition for cert. pending, No. 09-1497 (filed June 8, 2010). For example, the courts in *Williams* and *Almany* held the defendants there, each of whom possessed a firearm in furtherance of a drug trafficking crime, were not subject to the

five-year minimum term of imprisonment prescribed by Section 924(c)(1)(A)(i) because each was subject to a ten-year minimum term under 21 U.S.C. 841(b)(1)(A) for his underlying drug trafficking crime. *Williams*, 558 F.3d at 167-168; *Almany*, 598 F.3d at 242.

2. Respondent pleaded guilty to the offenses listed above, p. 2, *supra*. Count 1 carried a ten-year minimum term of imprisonment, see 21 U.S.C. 841(b)(1)(A); Count 2, a five-year minimum term, see 21 U.S.C. 841(b)(1)(B); and Count 3, a five-year minimum term, see 18 U.S.C. 924(c)(1)(A)(i). The district court sentenced respondent to concurrent ten-year terms of imprisonment on Counts 1 and 2, and a consecutive five-year term of imprisonment on Count 3, to be followed by five years of supervised release. C.A. App. 49, 57-58.

3. Respondent appealed, arguing that the Second Circuit's intervening decision in *Williams* exempted him from the mandatory minimum consecutive five-year sentence under Section 924(c)(1)(A) because he was subject to a greater minimum penalty for one of his predicate drug trafficking crimes. The court of appeals agreed *Williams* was controlling, vacated respondent's sentence, and remanded for resentencing. App., *infra*, 2a-4a. The court declined the government's request to defer its decision pending this Court's decisions in *Abbott* v. *United States*, No. 09-479 (oral argument scheduled for Oct. 4, 2010), and *Gould* v. *United States*, No. 09-7073 (oral argument scheduled for Oct. 4, 2010). App., *infra*, 3a n.1. The court of appeals granted the government's motion to stay issuance of its mandate. *Id.* at 5a-6a.

REASONS FOR GRANTING THE PETITION

On October 4, 2010 this Court will hear argument in *Abbott*, *supra*, and *Gould*, *supra*, regarding the meaning

of the "except" clause of Section 924(c). This case presents the same issue as *Abbott* and *Gould*: whether the "except" clause of Section 924(c) exempts a defendant from the mandatory minimum consecutive sentence prescribed for violating that provision when he also faces a greater mandatory minimum sentence on another count of conviction involving different conduct. Respondent, like the defendant in *Gould* (and like the defendants in the pending petitions in *Williams*, *supra* and *Almany*, *supra*), faced a five-year minimum term of imprisonment for violating Section 924(c)(1) and a ten-year minimum term under 21 U.S.C. 841(b)(1)(A) for an underlying drug trafficking crime. See *United States* v. *Gould*, 329 Fed. Appx. 569, 569-570 (5th Cir. 2009) (per curiam). The court of appeals in *Gould* held that the "except" clause of Section 924(c) did not exempt Gould from the mandatory minimum consecutive five-year term of imprisonment for violating that statute. *Ibid.* Because the resolution of *Abbott* and *Gould* will affect the proper disposition of this case, this petition should be held pending the Court's decisions in *Abbott* and *Gould*.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decisions in *Abbott* and *Gould*, and disposed of as appropriate in light of those decisions.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

SEPTEMBER 2010

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 08-2834-cr

UNITED STATES OF AMERICA, APPELLEE

v.

RORY PRAYLOW, ALSO KNOWN AS DOG,
DEFENDANT-APPELLANT

SUMMARY ORDER

APPEARANCES:

FOR APPELLANT: PAUL J. MADDEN,
Brooklyn, New York.

FOR APPELLEE: ELIE HONIG, Katherine Polk Failla, Assistant United States Attorneys, of counsel, for Preet Bharara, United States Attorney for the Southern District of New York.

RALPH K. WINTER, PETER W. HALL, *Circuit Judges*,

MIRIAM GOLDMAN CEDARBAUM, *District Judge*.*

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* The Honorable Miriam Goldman Cedarbaum of the United States District Court for the Southern District of New York, sitting by designation.

Appeal from a judgment of the United States District Court for the Southern District of New York (Patterson, Jr., J.). **UPON DUE CONSIDERATION it is hereby ORDERED, ADJUDGED, AND DECREED** that the sentence of the district court is **VACATED** and the case is **REMANDED** for further proceedings.

Defendant-Appellant Rory Praylow pled guilty to conspiracy to distribute and possess with intent to distribute heroin, *see* 21 U.S.C. § 846, distribution and possession with intent to distribute heroin, *see* 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(B), and possession of a firearm in furtherance of a narcotics trafficking crime, *see* 18 U.S.C. § 924(c). Praylow appeals from the district court's May 13, 2008 judgment, arguing that his aggregate 180-month sentence, consisting of two concurrent 120-month sentences on the narcotics counts and one consecutive 60-month sentence for the guilty plea on the firearms count was plain error under this Court's decisions in *United States v. Williams*, 558 F.3d 166 (2d Cir. 2009) and *United States v. Whitley*, 529 F.3d 150 (2d Cir. 2008). We assume familiarity with the facts and procedural history, which we reference only as necessary to explain our decision.

Title 18 U.S.C. § 924(c)(1)(A) criminalizes the use or carrying of a firearm during and in relation to a crime of violence or a drug trafficking crime and imposes specified mandatory minimum terms of incarceration in addition to the punishment provided for the underlying crime "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law." In *United States v. Whitley*, 529 F.3d 150 (2d Cir. 2008), we interpreted this "except" clause to mean that a mandatory minimum sentence pre-

scribed under § 924(c) need not run consecutively to any greater mandatory minimum sentence. *See id.* at 153. In *United States v. Williams*, 558 F.3d 166 (2d Cir. 2009), we extended *Whitley*, holding that a district court's contrary interpretation of § 924(c) constituted plain error. *See id.* at 169 n.2, 176.

In this case, sentencing Praylow before this Court issued its decisions in *Whitley* and *Williams*, the district court concluded that Praylow's mandatory minimum sentence of 60 months' incarceration for his § 924(c) conviction must run consecutively to his sentence on his narcotics conviction under 21 U.S.C. § 841(a), even though the latter conviction carried a mandatory minimum of 120 months' imprisonment. *See* 21 U.S.C. § 841(b)(1)(A). This ruling, though not objected to below, was plain error requiring a remand for resentencing.[1] *See United States v. Williams*, 558 F.3d at 170. In resentencing Praylow, the district court of course retains discretionary authority to impose a consecutive sentence consistent with its responsibility under 18 U.S.C. § 3553. *See United States v. Whitley*, 529 F.3d at 158.

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[1] We are mindful that the United States has petitioned for a writ of certiorari in *Williams*, *see United States v. Williams*, 558 F.3d 166 (2d Cir. 2009), petition for cert. filed, 78 U.S.L.W. 3254 (U.S. Oct. 20, 2009) (No. 09-466), and that the Supreme Court has granted certiorari in *United States v. Abbott*, 574 F.3d 203 (3d Cir. 2009), cert. granted, 130 S. Ct. 1284 (U.S. Jan. 25, 2010) (No.09-479), and *United States v. Gould*, 329 F. App'x 569 (5th Cir. 2009), cert. granted, 130 S. Ct. 1283 (U.S. Jan. 25, 2010) (No. 09-7073), which also address mandatory consecutive sentencing under § 924(c). In the absence of any contrary authority from the Supreme Court, however, our existing precedents compel the conclusion that the imposition of a mandatory consecutive sentence in the instant case was plain error.

Accordingly, the sentence of the district court is **VACATED** and **REMANDED** for further proceedings consistent with this decision.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 08-2834-cr

UNITED STATES OF AMERICA, APPELLEE

v.

RORY PRAYLOW, ALSO KNOWN AS DOG,
DEFENDANT-APPELLANT

[Filed: Jul. 13, 2010]

ORDER

Before: RALPH K. WINTER, PETER W. HALL, *Circuit Judges*, MIRIAM GOLDMAN CEDARBAUM, *District Judge.*[*]

IT IS HEREBY ORDERED that the Government's motion to stay the mandate for 90-days so it may consider whether to file a petition for writ of certiorari is GRANTED.

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[*] The Honorable Miriam Goldman Cedarbaum for the United States District Court of the Southern District of New York, sitting by designation.

FOR THE COURT,

CATHERINE O'HAGAN WOLFE

CATHERINE O'HAGAN WOLFE, Clerk

Judy Pisnanont, Motions Staff Attorney

APPENDIX C

18 U.S.C. 924(c)(1) provides:

Penalties

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law —

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.